IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 05-35569, 05-35570, 05-35646

NATIONAL WILDLIFE FEDERATION, et al.,
Plaintiffs-Appellees,

and

STATE OF OREGON,
Intervenor-Plaintiff-Appellee,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,
Defendants-Appellants,

and

BPA CUSTOMER GROUP, et al.,
Defendants/Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
JUDGE JAMES A. REDDEN, CV 01-640-RE

BPA CUSTOMER GROUP'S BRIEF IN SUPPORT OF THE PRELIMINARY INJUNCTION APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the parties known collectively as the "BPA Customer Group" state as follows:

Northwest Requirement Utilities ("NRU") represents consumer-owned electric utilities located in California, Idaho, Montana, Nevada, Wyoming, Oregon and Washington. NRU has no parent corporation and has not issued shares to the public in the United States or abroad.

Pacific Northwest Generating Cooperative ("PNGC") is a non-profit generation and transmission cooperative. PNGC has no parent corporation and has not issued shares to the public in the United States or abroad.

Industrial Customers of Northwest Utilities ("ICNU") is an incorporated, non-profit trade association of large industrial electricity users in the Pacific Northwest. ICNU has no parent corporation and has not issued shares to the public in the United States or abroad.

Alcoa Inc., is a producer of aluminum, with no parent corporation and no publicly held company which owns 10% or more of its stock.

International Association of Machinists and Aerospace Workers is a union, and has no parent corporation and has not issued shares to the public in the United States or abroad.

Public Power Council ("PPC") represents 114 regional consumer-owned utilities which fall into three categories: municipal utilities; public or people's utility districts; and rural electric cooperatives. PPC has no parent corporation and has not issued shares to the public in the United States or abroad.

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I. Jurisdictional Statement

This Court has jurisdiction to review interlocutory orders of district courts granting injunctions. 28 U.S.C. § 1292. On June 10, 2005, the U.S. District Court for the District of Oregon issued an injunction (the "June 10, 2005 Injunction") requiring 24-hour "spill" at Lower Granite, Little Goose, Lower Monumental and Ice Harbor Dams (excluding amounts necessary for producing sufficient electricity to operate the facility) and continuous spill at the fourth collector facility, McNary Dam, with respect to all flows in excess of 50,000 cubic feet per second ("cfs"). *National Wildlife Federation v. National Marine Fisheries Service*, No. 01-640, 10 (D. Or. filed June 10, 2005) (ER560)[1]. Appellants Northwest Requirement Utilities, Pacific Northwest Generating Cooperative, Industrial Customers of Northwest Utilities, Alcoa Inc., International Association of Machinists and Aerospace Workers, and Public Power Council (collectively the "BPA Customer

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[1] In this brief, the BPA Customer Group will rely upon the Federal Appellants' Excerpts of Record ("ER"), because of the Court's expedited briefing schedule for this matter. Additionally, to the extent that the BPA Customer Group's brief relies upon exhibits that were submitted in support of the BPA Customer Group's *Emergency Motion for Stay Under Circuit Rule 27-3 For Stay Pending Appeal* (filed June 15, 2005), the BPA Customer Group will continue to cite to those exhibits. Per the request of the Court Clerk, the BPA Customer Group has Bates-stamped those exhibits and resubmitted them to the Court with this filing as *Exhibits for BPA Customer Group's Brief in Support of the Preliminary Injunction Appeal, Volume One* and *Volume Two*. It is the BPA Customer Group's understanding that the Court provided permission for such actions through communications with Federal Appellants' Counsel.

Group") timely filed a notice of preliminary injunction appeal on June 13, 2005, giving rise to appellate jurisdiction in this Court. *See* 28 U.S.C. § 1292(a)(1).

II. Statement of Issues

A. Part I – Issues Pertaining to the June 10, 2005 Injunction

1. Whether the U.S. District Court for the District of Oregon abused its discretion by issuing an injunction against the U.S. Army Corps of Engineers without a reasoned explanation of the legal or factual basis for finding that the U.S. Army Corps of Engineers violated the Endangered Species Act.

2. Whether the U.S. District Court for the District of Oregon abused its discretion by issuing a mandatory injunction and failing to narrowly tailor the relief to redress the alleged harm.

B. Part II – Issues Pertaining to the May 26, 2005 Opinion and Order

1. Whether the U.S. District Court for the District of Oregon erred in concluding that the Endangered Species Act § 7 requires the National Oceanic and Atmospheric Administration to aggregate the effects of the proposed action and the baseline (including the existence of the Federal Columbia River Power System) when determining whether a proposed action is likely to jeopardize the continued existence of a species.

2. Whether the U.S. District Court for the District of Oregon erred in concluding that the 2004 Biological Opinion critical habitat determinations were

flawed when the National Oceanic and Atmospheric Administration considered both recovery and survival in its critical habitat determination.

3. Whether the U.S. District Court for the District of Oregon erred in concluding that the Endangered Species Act § 7 requires the National Oceanic and Atmospheric Administration to consider both recovery and survival in its jeopardy determination.

III. Statement of the Case

On December 30, 2004, National Wildlife Federation ("NWF") and other parties filed amended complaints in this proceeding challenging the *Endangered Species Act-Section 7 Consultation Biological Opinion for the Consultation on Remand for Operation of the Columbia River Power System and 19 Bureau of Reclamation Projects in the Columbia Basin*, ER578 and ER992 (the "2004 BiOp"). On May 26, 2005, the U.S. District Court for the District of Oregon issued an opinion concluding that the 2004 BiOp for the Federal Columbia River Power System ("FCRPS") was "legally flawed" in four respects and entered a non-final order granting summary judgment to NWF. *National Wildlife Federation v. National Marine Fisheries Service*, No. 01-640, 15, 44 (D. Or. filed May 26, 2005) (ER325) (the "May 26, 2005 Opinion").

On March 21, 2005, NWF amended its complaint to join the U.S. Army Corps of Engineers' ("Corps") and U.S. Bureau of Reclamation's ("Reclamation")

Records of Decision ("RODs") and to challenge their ongoing operations of the FCRPS.[2] Concurrent with the filing of its amended complaint, NWF filed a motion for preliminary injunction, or in the alternative, motion for permanent injunction. *See* ER 1.

On June 10, 2005, the district court issued an order partially granting NWF's motion for preliminary injunction and ordered the Corps to provide summer spill at the four FCRPS collector projects (Lower Granite, Little Goose, Lower Monumental, and McNary Dams) and increased spill at one other project (Ice Harbor Dam). June 10, 2005 Injunction at 10 (ER569). The district court determined that the Corps and Reclamation acted arbitrarily and capriciously in relying upon the 2004 BiOp. June 10, 2005 Injunction at 7. The district court determined that such arbitrary and capricious reliance violated the procedural and substantive requirements of the Endangered Species Act ("ESA") § 7(a)(2). The district court also stated that it found that "irreparable harm results to listed species as a result of the action agencies' implementation of the updated proposed action."

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[2] *See* U.S. Army Corps of Engineers, Northwest Division, "Record of Consultation and Statement of Decision Concerning the Final Updated Proposed Action for the FCRPS Biological Opinion Remand and NOAA's National Marine Fisheries Service November 20, 2004 Biological Opinion" (Jan. 3, 2005) ER1668; U.S. Department of the Interior, Bureau of Reclamation, "Decision Document Concerning the Final Updated Proposed Action and NOAA Fisheries' November 30, 2004 Biological Opinion Consultation on Remand for Operation of the Federal Columbia River Power System Including 19 Bureau of Reclamation Projects in the Columbia Basin" (Jan. 12, 2005).

June 10, 2005 Injunction at 9 (ER568). Based upon this finding, the district court issued an injunction requiring the Corps to spill at the four collector projects and increase spill at another project. June 10, 2005 Injunction at 10 (ER569).

The Federal Defendants and the BPA Customer Group both timely filed a notice of preliminary injunction appeal on June 13, 2005. An *Emergency Motion for Stay Under Circuit Rule 27-3 For Stay Pending Appeal* was filed with this Court on June 15, 2005, and was denied by this Court on June 20, 2005.

IV. Statement of the Facts

The operation of the FCRPS, like other large river basin systems, is a complex matter that requires deliberate judgment and considerable agency expertise to carry out the mandates of various congressional directives. Since before the first ESA listings in 1991, the Bonneville Power Administration ("BPA"), Corps and Reclamation (collectively referred to as the "action agencies"), in ongoing consultation with the National Oceanic and Atmospheric Administration-Fisheries ("NOAA"), have used this judgment and expertise to benefit the salmon and steelhead, as well as comply with their statutory obligations, such as flood control, irrigation, navigation, recreation and to provide low cost power for the Northwest region's economy.

The 2004 BiOp issued on December 11, 2004, reflects the latest product of the ongoing agency consultation. The 2004 BiOp analyzed the impacts of the

action agencies' Updated Proposed Action ("UPA"). This UPA, developed in collaboration with NOAA, directly responds to the concerns expressed by the district court in *National Wildlife Federation v. National Marine Fisheries Service*, 254 F.Supp. 2d 1196 (D. Or. 2003) and the Supplemental Order, Docket No. 444 (July 2, 2003). The UPA reflects a continued and unprecedented commitment to endangered species mitigation and conservation, and will require an enormous commitment of financial and other resources by the action agencies.[3]

Following release of the 2004 BiOp, each of the action agencies issued RODs that adopted the UPA. Each of the RODs concluded that implementation of the UPA was consistent with ESA § 7(a)(2) obligations. In reaching their conclusions, the action agencies relied, in large part—though not exclusively—on the 2004 BiOp.

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[3] The United States General Accounting Office Report has found that:

> Between fiscal years 1997 and 2001, Bonneville spent over $1.1 billion to support fish and wildlife programs, primarily salmon and steelhead. . . . Additionally, Bonneville estimates that spilling water (not including the water spilled pursuant to the June 10, 2005 Injunction) from dams to enhance fish survival has resulted in over $2.2 billion in foregone revenue or increased power purchases.

GAO Report: Bonneville Power Administration: Obligations to Fish and Wildlife in the Pacific Northwest at 1 (04-JUN-03, GAO-03-844T). http://frwebgate.access.gpo.gov/cgi-bin/multidb.cgi.

From 1978 to 2002, the BPA spent approximately $6.2 billion for Columbia Basin salmon and steelhead. *See* NWPPC Third Annual Report to Northwest Governors on Expenditure of BPA, 02/2004. http://www.nwcouncil.org/library/2004/2004-3/report.pdf. This cumulative figure includes power purchases, foregone revenues, reimbursable expenses, and direct programs.

In issuing the June 10, 2005 Injunction, the district court mandated that the Corps provide summer spill at four specific FCRPS projects and increase spill at another FCRPS project. The June 10, 2005 Injunction requires the Corps to modify the spill regime set out in the 2004 BiOp at these projects. This required, as a practical matter, increased in-stream passage rather than barge transportation of juvenile fish.

The June 10, 2005 Injunction abandons a working Snake River Fall Chinook ("SRF Chinook") operations strategy (which has relied heavily upon barge transportation of juvenile fish). The recent abundance trends for SRF Chinook, clearly point toward a stable or rebuilding population. *See* Chapman Dec. at ¶¶ 5-10 (Exhibit BPACG0263-BPACG0265). The SRF Chinook population has rebounded dramatically in recent years under the current summer transportation regime (which is consistent with the 2000 Biological Opinion ("2000 BiOp"), the 2004 BiOp, and the 2004 UPA).

Since NOAA initially listed SRF Chinook, the escapement of adults of both hatchery and natural origin has increased by over 12-fold. Chapman Decl. at ¶¶ 5-10 (Exhibit BPACG0263-BPACG0265). At Lower Granite Dam, total counts of returning adult SRF Chinook (hatchery and natural-origin) have exceeded 14,000 in the most recent two years. *Id.* Adults of natural-origin are estimated to number approximately 4,000—roughly one-third of the total fish count. *Id.* Over the past

five years, adult returns of natural origin on average have exceeded NOAA's interim recovery target.[4]

The population rebound has not appeared by chance. Since the SRF Chinook ESA listing in 1990, several factors contributed to the increase in population numbers for SRF Chinook. Hydrosystem operations that relaxed migration bottlenecks and improved survival of SRF Chinook during all life stages spent in the areas affected by FCRPS facilities have interacted favorably with improved ocean conditions. *Id.* at ¶ 9 (Exhibit BPACG2065).

Moreover, the June 10, 2005 Injunction is likely to be more harmful to SRF Chinook. In response to *Plaintiffs' Preliminary Injunction Motion*, NOAA independently analyzed the potential impacts of Plaintiffs' requested relief. NOAA determined that Plaintiffs' requested relief would likely have greater adverse impacts on out-migrating juvenile SRF Chinook than continued

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[4] Escapements arguably could have increased even more if the substantial commercial and recreational harvest of SRF Chinook had been reduced or terminated. Chapman Decl. ¶ 6 (Exhibit BPACG0264). For the last several years, the Columbia River mainstem fisheries have been managed with a combined 31 percent harvest rate limit for SRF Chinook for treaty and non-treaty fisheries. *Id.* at ¶ 10 (Exhibit BPACG20265). The actual harvest rate has ranged between 21 percent and 31 percent over the last five years. Ocean harvest is approximately 15 percent. *Id.* Heavy harvest, in both freshwater and the ocean during and following periods of extremely poor ocean survival conditions, has been cited in research and noted in the 2004 BiOp's administrative record as a contributor to the decline in spawning escapement of naturally produced Columbia and Snake River salmonids during the 1980s and 1990s. *Id.*

implementation of the UPA. *See* Toole Decl. at ¶ 18 (Exhibit BPACG0313) ("the relative difference in system survival under the plaintiffs' injunctive relief proposal is 26-48 percent lower than the system survival under the UPA operation.").[5]

Additionally, the Federal Defendants and others presented numerous expert opinions,[6] explaining the likely adverse impacts from adopting the proposed

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[5] This estimate was based upon a NOAA SIMPAS analysis which was conducted based solely upon the effects of the spill regime that the district court adopted in its June 10, 2005 Injunction. *See* Toole Decl. ¶ 17 (Exhibit BPACG0312-0313).

[6] McKern Decl. at ¶¶ 12–14 (TDG risks) (Exhibit BPACG0410-BPACG0412), ¶ 18 (in-river migration risks) (Exhibit BPACG0413-BPACG0414); Chapman Decl. at ¶¶ 22–29, 31 (in-river migration risks) (Exhibit BPACG0271-BPACG0274), ¶ 32 (increased predation risks) (Exhibit BPACG020275), ¶ 40 (degraded river conditions risks) (Exhibit BPACG0278), ¶ 43 (in-river migration risks) (Exhibit BPACG0279), ¶ 44-46 (TDG Risks) (Exhibit BPACG0279-BPACG0281); Ocker Decl. at ¶ 23 (increased spill will negate the potential benefits of the "spread-the-risk" strategy of transporting SRF Chinook during periods of poor water quality), ¶ 29 (increased spill may decrease holding overs) (Exhibit BPACG0094-BPACG0095), ¶ 30 (concluding in-river migration may result in a higher mortality) (Exhibit BPACG0095), ¶ 31 (Exhibit BPACG0095-BPACG0096); Peters Decl. at ¶ 6, ¶ 15, ¶ 19 (reduce transport) (Exhibit BPACG0394-BPACG0397), ¶¶ 21 - 22 (TDG levels will exceed safe levels) (Exhibit BPACG0399), ¶ 28 (increased spill would preclude planned research at Snake River dams) (Exhibit BPACG0402), ¶ 16 (increased spill has not been adequately evaluated) (Exhibit BPACG0398), ¶¶ 18-23 (increased spill would preclude research on fish transportation and the Removable Spillway Weirs being tested at Snake River dams) (Exhibit BPACG0398-BPACG0400); Henriksen Decl. at ¶ 25 (Plaintiffs' proposed spill operation will result in TDG exceeding legal criterion) (Exhibit BPACG0434), ¶ 41 (TDG will exceed state variance levels) (Exhibit BPACG0440); Ponganis Decl. at ¶¶ 69-71, ¶¶ 73-74 (Plaintiffs' summer spill request would be a detriment to ongoing salmon survival research) (Exhibit BPACG0496); Lohn at ¶ 13 (describing "gas bubble trauma" that can result from high spill levels) (Exhibit BPACG0512).

summer spill regime. In issuing its ruling, the district court did not address any of this evidence.

Several factors must be considered to ensure safe spill passage of smolts at each of the FCRPS projects. Peters Decl. ¶ 12 (Exhibit BPACG0396). These factors include in-river conditions, level of spill, total dissolved gas ("TDG"), more project-specific information on approach conditions in the forebay, conveyance through the spillway, and hydraulic egress conditions through the tailrace.

The June 10, 2005 Injunction abandons a cornerstone principle of "spread the risk" policy by increasing the number of juveniles that must migrate in-river.[7] Additionally, spilling a large proportion of the river at multiple sequential dams, as

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[7] To ignore the "spread the risk" policy and reduce transportation during a drought year is a high-risk venture. Because river water temperature will likely exceed the EPA's maximum water temperatures for most of this summer, in-river migration will be lethal to juvenile SRF Chinook. Chapman Decl. ¶ 24 (BPACG0272). The June 10, 2005 Injunction will result in the dramatic reduction in the percentage of juvenile SRF Chinook transported and corresponding increase in the percentage of SRF Chinook juveniles which must migrate in-river. The EPA has determined that river temperatures greater than 18-20° Celsius (C) constitute high disease risk to SRF Chinook. The most recent hydrological estimates indicate that 2005 river conditions will likely resemble the river conditions in 2003. Toole Decl. at ¶ 13 (Exhibit BPACG0311). Because 2005 resembles 2003, water temperatures likely will exceed this 18-20°C threshold for most of the summer. 2003 is generally characterized as a very low-flow, high-temperature year with poor in-river migration conditions for juvenile SRF Chinook. During that year, water temperatures remained above 20°C from the middle of July through the end of August. Chapman Decl. at ¶ 6 (Exhibit BPACG2064). From early August through the end of the month, water temperatures were generally above 22°C and, periodically, over 24°C. *Id.*

required by the June 10, 2005 Injunction, entrains atmospheric gases and could also result in potentially dangerous elevated levels of supersaturated gases in tailraces. Chapman Decl. ¶¶ 20-22 (Exhibit BPACG2069-BPACG0270); Peters Decl. ¶ 21 (Exhibit BPACG0399). The Environmental Protection Agency ("EPA") has established a water quality standard limit of 110 percent of saturation for river conditions in the Columbia River basin, although discrete permissible variations of up to 120 percent in tailraces and 115 percent in forebays have been permitted where no harm to fish has been demonstrated. The district court-ordered spill regime will likely cause exceedences of these TDG standards. To the extent that the June 10, 2005 Injunction would result in gas supersaturation levels in excess of these standards, the injunction will likely cause trauma to juvenile and adult SRF Chinook.[8] Chapman Decl. ¶¶ 20-22 (Exhibit BPACG2069-BPACG0270).

Finally, the June 10, 2005 Injunction will likely have an overall net financial impact of $67 million. 2nd Carr Decl. at ¶ 18 (Exhibit BPACG 0191). Of that

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[8] Recognizing the TDG problems from the June 10, 2005 Injunction, NWF is now attempting to modify the injunction to address the TDG problems raised by the court's injunction. NWF Opp. to BPACG Emergency Stay Motion at 37, fn. 20. While this responsible action by NWF may eventually minimize an adverse impact of the injunction on SRF Chinook, it actually supports the conclusion that the court's June 10, 2005 Injunction failed to consider adequately this relevant factor in issuing its injunction (regardless of whether the district court eventually modifies its injunction to correct this clear error in judgment).

amount, 78 percent would need to be recovered from rate increases (with the balance representing foregone revenues to BPA customers that purchase a percentage of the system generation output). *Id.* at ¶ 18-19. This would result in $52 million in immediate BPA rate impacts. *Id.* According to BPA analysis, the June 10, 2005 Injunction would translate into an immediate rate increase of 3.9 percent. *Id.* at ¶ 20. BPA's current wholesale power rates at 3.0 cents kWh are too high for the region and continue to impede economic recovery. The economic consequences of the increased rates due to the June 10, 2005 Injunction would likely be substantial. These regional consequences include a loss of 513 jobs to the region, and a loss of personal income of $54 million. *Id.* at ¶ 26.

V. Summary of Argument

As described in Part I of the Argument Section, when the district court issued the June 10, 2005 Injunction, it took the unprecedented step of injecting itself into the day-to-day operation of the FCRPS. This extraordinary step imposes an unproven approach to river operation that is based upon a misunderstanding of the governing law as well as the biological impacts of its action. The district court acted in this extraordinary manner (with its two terse pages addressing the spill issue), without any clear articulation of the alleged violation, or factual findings regarding the acts that cause the alleged violation, or the relationship of any alleged violation to avoiding irreparable harm. In doing so, the court abused its

discretion by issuing the June 10, 2005 Injunction. *See Federal Trade Com'n v. Enforma Natural Products, Inc.* 362 F.3d 1204, 1216 (9th Cir. 2004) (stating that to be sufficient, the district court's preliminary injunction factual findings "must be explicit enough to give the appellate court a clear understanding of the basis for the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision." (quoting *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1444 (9th Cir. 1985)).

Because of this, this Court should set aside the June 10, 2005 Injunction without reviewing the district court's May 26, 2005 Opinion regarding the validity of the 2004 BiOp. However, because the district court erred as a matter of law in concluding that the 2004 BiOp was legally flawed in the May 26, 2005 Opinion, the district court also erred in concluding in the June 10, 2005 Injunction that NWF was likely to succeed on the merits of its separate claims against the Corps. This provides additional grounds to set aside the June 10, 2005 Injunction.

As described in Part II of the Argument Section, the jeopardy analysis framework adopted by the district court in the May 26, 2005 Opinion dramatically expands the ESA § 7(a)(2) obligation by requiring the Federal agencies operating the FCRPS to mitigate, or otherwise be responsible for, the adverse impacts related to: (1) past actions (such as the existence of the dams and modifications to the Columbia River estuary); (2) actions which the FCRPS operators lacked statutory

authority to change; and (3) actions of third parties (such as harvest and hatcheries' actions). The district court concluded that ESA § 7(a)(2) requires the FCRPS operators to be responsible for such impacts in order to continue to operate the FCRPS, regardless of causation. The district court's conclusions conflict with the plain language and structure of the ESA and case law interpreting the Act.

VI. Standard of Review

A district court's decision granting preliminary injunctive relief is reviewed to determine whether the court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See Harris v. Board of Supervisors, L.A. County*, 366 F.3d 754, 760 (9th Cir. 2004); *Enforma Natural Products*, 362 F.3d at 1211-12; *Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir. 2004).

VII. Argument

A. Part I – The U.S. District Court for the District of Oregon Abused Its Discretion in Issuing the June 10, 2005 Injunction.

1. The district court abused its discretion by issuing an injunction against the Corps without a reasoned explanation of the legal basis for its decision.

The district court abused its discretion in issuing the June 10, 2005 Injunction Order by failing to identify with any meaningful clarity the violation of law being remedied. It should be axiomatic that a court cannot appropriately

remedy a perceived violation of law without first articulating the nature and substance of that violation. Yet that is precisely what occurred here.

The district court begins by suggesting that the plaintiffs presented two claims for an injunction against the Corps and Reclamation: "(1) that the agencies failed to comply with the procedural and substantive requirements under § 7(a)(2) of the ESA, and (2) that they will likely violate the ESA's prohibition against unlawful take pursuant to section 9." June 10, 2005 Injunction at 3-4 (ER562-563). Next, the district court indicates that its decision on the first claim obviated any need to decide the second claim. *Id.* at 4. The district court then starts its analysis by noting that it already held that NOAA's 2004 BiOp was invalid under the Administrative Procedures Act ("APA"), because of four perceived legal errors, although the court expressly declined to withdraw and remand the biological opinion and has left that issue for later. From there, the district court concludes that the action agencies "also violate the ESA," because of their apparent misplaced reliance on the 2004 BiOp without any independent inquiry. *Id.* at 6.

Unfortunately, the district court here never explains whether it is concluding that the action agencies acted arbitrarily and capriciously in relying on an allegedly flawed biological opinion, or that the action agencies violated the substantive mandate of the ESA to avoid jeopardy because the action agencies apparently "knew of this other data, and of its marginalization by NOAA, and yet adopted

NOAA's no-jeopardy determination." *Id.* at 7. If it is the latter, the June 10, 2005 Injunction contains no discussion of the record (*e.g.*, identifying what is the "other data"), no citations to the record, and does not purport to render any factual judgment on whether or not there is a likelihood of jeopardy to the species. The June 10, 2005 Injunction later suggests—albeit inappropriately—that the substantive mandate is not whether or not jeopardy would occur, but rather whether the action agencies adequately ensured that their action would not cause jeopardy. *Id.* at 9 (stating that "I also find that if the action agencies carry out the proposed action, they will not have met their key substantive obligation under the ESA to 'insure that any action' they carry out 'is not likely to jeopardize' or adversely affect the critical habitat of listed species.") (citation omitted). If it is the former, then the order by fiat now enlarges the obligations imposed on the action agencies to "second-guess" legal judgments of the Service agencies charged with interpreting the ESA.[9] The district court then concludes this part of its analysis with the conclusion that the "agencies have failed in their continuing independent duties to ensure that their actions will avoid jeopardy" and, as such, the determinations by those agencies that their action will not likely jeopardize listed

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[9] This would conflict with the general principle that agencies charged with administering a particular statutory program are the appropriate agencies to whom deference is owed. *Cf. California Trout, Inc. v. Federal Energy Regulatory Commission*, 313 F.3d 1131, 1133-34 (9th Cir. 2002); *American Rivers v. Federal Energy Regulatory Commission*, 129 F.3d 99, 107 (2d Cir. 1997).

species are arbitrary and capricious. *Id.* at 7.

The problem is that the district court never identifies with any specificity what violation of the law by the action agencies warrants the mandatory injunction. Instead, it conflates substantive and procedural violations, and APA and ESA violations. A procedural "violation" of the ESA occurs when either the Action Agency or Service agency has failed to perform a specifically required task under the ESA, such as whether to consult under § 7(a)(2), or to decide whether to designate critical habitat. *See Bennett v. Spear*, 520 U.S. 154 (1997). Such claims are cognizable under § 11(g) or the citizen suit provision of the ESA, 16 U.S.C. § 1540(g). A substantive violation of the ESA also occurs, and can be brought directly under the ESA after appropriate notice, when a Federal agency action is likely to jeopardize the continued existence of an endangered or threatened species or adversely modify or destroy critical habitat, or against any party who is reasonably likely to "take" a protected species without the requisite incidental take permit or incidental take statement. But when an agency administers its responsibilities under the ESA, and does so inadequately, the Supreme Court in *Bennett* referred to such action as "maladministration," which again is a procedural infirmity—but under the APA—and not the ESA. *Id.* at 173-176.

By simply assuming that its May 26, 2005 Opinion effectively answered the nature of the violation by the action agencies, the district court failed to state

whether it was concluding that a substantive violation of the ESA occurred—and thus subject to § 1540(g), or whether a "procedural" violation of the ESA occurred—equally subject to § 1540(g), or whether the Corps violated the APA, because it acted arbitrarily and capriciously.

The June 10, 2005 Injunction provides no basis for concluding that there might be a substantive violation of the ESA. The district court expressly declined to rule on whether there would be a violation of § 9 of the Act, and therefore the only substantive violation of the ESA arguably could be that the proposed action is likely to jeopardize the species or adversely modify or destroy critical habitat. The district court neither discusses the evidence in the record which would allow for such a conclusion, nor does the court even purport to make any such judgment. Nor could it have done so.

The district court also fails to articulate any specific ESA procedural violation by the Corps, and could not do so. The district court, for instance, quotes from *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985), but there this Court held that the Forest Service's failure to prepare a biological assessment, required under 16 U.S.C. § 1536(c), constituted a substantial procedural violation of the Act—and quite appropriately, because the Forest Service's failure to prepare the biological assessment prevented triggering the formal consultation process and the preparation of a biological opinion. Here, the district court did not identify any

such mandatory procedural obligation that the Corps allegedly violated. *See e.g. Washington Toxics Coalition v. EPA*, No. 04-35138 (9th Cir. June 29, 2005) (concluding the EPA's failure to consult violated the ESA, actionable under ESA § 11(g)).

Yet, it is the nature of the violation that first must be identified to effectively craft any appropriate remedy, and also to understand this Court's own precedent, such as *Thomas v. Peterson*. Instead, the district court, at best, appears to suggest in its June 10, 2005 Injunction that the Corps violated the APA by failing to scrutinize and independently assess the efficacy of NOAA's 2004 BiOp, and thus ensure that its action would not transcend the substantive prescription of § 7(a)(2). But the court provides no rationale for concluding that the failure to independently assess the "legal judgments" contained in a biological opinion constitutes arbitrary and capricious action by an Action Agency.[10] And the district court then fails to

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[10] The district court errs in relying upon *Northwest Envtl. Advocates v. EPA*, 268 F. Supp. 2d 1255 (D. Or. 2003). June 10, 2005 Injunction at 7 (ER566). There, the Action Agency, the EPA, ignored the conclusions of its own experts and instead relied upon a NMFS biological opinion, which was subsequently found deficient. *Northwest Envtl. Advocates*, 268 F. Supp. 2d at 1265-69, 1274. After the court set aside that biological opinion, it determined that EPA acted arbitrarily and capriciously in relying on that biological opinion, without adequately addressing the conflicting opinions of EPA's own experts. *Id.* at 1274. Here, NWF has not alleged, and the district court did not find, that any conflicting expert opinion within the Corps called into question the reasonableness of its reliance upon the technical findings within the 2004 BiOp. Rather, the district court merely asserts that the action agencies knew of "other" unspecified data undermining the no jeopardy conclusion in the 2004 BiOp, without providing any support for this assertion. June 10, 2005 Injunction at 7 (ER566). But even this statement by the

appreciate that the appropriate inquiry into any remedy for any such alleged APA violation is likely to be different than if the court had found a substantive or procedural violation under the ESA.

The district court, therefore, abused its discretion in issuing the mandatory injunction without first adequately identifying the alleged violation by the Corps that would inform the court's judgment on the appropriate remedy, if any. This is an abuse of discretion that requires that the injunction be vacated.

2. The district court abused its discretion by issuing a mandatory injunction and failing to narrowly tailor the relief to redress any alleged irreparable harm.

The district court abused its discretion in awarding extraordinary relief without first reviewing the evidence of irreparable harm caused by the alleged violation, then making detailed findings of fact, and finally discussing why its mandatory injunction would be an appropriate remedy to avoid that irreparable harm.[11]

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district court conflicts with its own decision, which found four legal flaws in the 2004 BiOp and did not render any decision on the facts.

[11] *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991); *Lewis v. Casey*, 518 U.S. 343, 359 (1996) ("[t]he scope of injunctive relief is dictated by the extent of the violation established."); *accord Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001) (in the context of "system wide relief" against state prison officials, the Ninth Circuit accordingly has adhered to "the longstanding maxim that injunctive relief against a state agency or official must be no broader than necessary to remedy the . . . violation."). The same limitation exists with respect to injunctive relief against federal officials or agencies. *See,*

This Court has held that the ESA alters a court's traditional equitable powers to remedy a violation of the Act. *See Southwest Center for Biological Diversity v. United States Forest Service*, 307 F.3d 964, 971-72 (9th Cir. 2002); *Biodiversity Legal Foundation v. Badgley*, 284 F.3d 1046, 1056 (9th Cir. 2002). As the environmental law professor who litigated *Tennessee Valley Authority ("TVA") v. Hill,* 437 US 153 (1978), explains, courts confronted with having to remedy a violation of the Act should not be able to override a clear congressional mandate – *i.e.,* statutory obligation. Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 Calif. L. Rev. 524 (1982). That is why this Court in *Badgely*, quoting *TVA v. Hill*, has held that not all violations of the ESA warrant an automatic injunction; instead, a court must determine whether an injunction is "necessary to effectuate the congressional purpose behind the statute" and whether absent any injunction (along with likelihood of success on the merits) irreparable harm is likely to occur. *Badgley*, 284 F.3d at 1056-57. A court, therefore, should not, under the guise of equity, permit an action that would otherwise violate a clear mandate under the Act, such as likely jeopardize a species or result in an illegal take of a protected species.

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e.g., Meinhold v. USDOD, 34 F.3d 1469, 1480 (9th Cir. 1994) ("[a]n injunction 'should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs'").

This was the issue in *TVA v. Hill.* In *TVA*, the plaintiffs brought suit under the ESA citizen suit provision, seeking to permanently enjoin the completion of the Tellico dam. *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977). Plaintiffs argued that the project would destroy the newly designated critical habitat for the snail darter, illegally take the species in violation of § 9 of the ESA, as well as jeopardize the species' continued existence. The district court held an evidentiary trial, "during which evidence was presented pertaining to whether the scheduled inundation of the Little Tennessee would jeopardize the species' continued survival. The Court also entertained argument on whether permanent injunctive relief would be appropriate to enforce compliance with the Act if the evidence made out a prima facie violation of §§ 1536 or 1538(a)(1)(B)." *Id.* at 1068-69. The Department of the Interior also argued that the project would completely destroy the snail darter's critical habitat. *Hill v. TVA*, 419 F.Supp. 753, 762 (E.D. Tenn. 1976). The district court concluded that the § 9 claim did not have to be decided, because it had found on the evidence that the project would jeopardize the species and modify or destroy its critical habitat. *Id.* at n.1. Despite finding that the project would violate the dual mandate of avoiding jeopardy or destruction of critical habitat, the district court nevertheless did not enjoin TVA from completing the dam. *Id.* at 764. The plaintiffs appealed, arguing that the remedy, under 16 U.S.C. § 1540(g)(1)(A), for such a "blatant statutory violation" should have been an injunction; otherwise,

TVA would be allowed to destroy critical habitat and jeopardize the species, a clear violation of the mandate and purpose of the Act. *Hill v. TVA*, 549 F.2d at 1070-71. The Court of Appeals reversed and the Supreme Court affirmed, holding that equitable considerations could not override the fundamental mandate of the Act. *TVA v. Hill*, 437 U.S. 153 (1978).[12]

But here there is no such similar finding of a substantive violation of the ESA, only—at best—a finding that the Corps acted arbitrarily and capriciously under the APA by not independently reviewing the efficacy of the 2004 BiOp to ensure against jeopardy.[13] This is far different than *Thomas*, where the Forest

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[12] *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 543 n.9 (1987) (describing *TVA* as "contain[ing] a flat ban on destruction of critical habitats of endangered species and it was conceded that completion of the dam would destroy the critical habitat of the snail darter"); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) ("It was conceded in *Hill* that completion of the dam would eliminate an endangered species by destroying its critical habitat. Refusal to enjoin the action would have ignored the 'explicit provisions of the Endangered Species Act.'"). In the seminal case of *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), the Fifth Circuit similarly enjoined a proposed project that unquestioningly was about to violate the substantive mandate of § 7(a)(2), by destroying critical habitat for the endangered Mississippi Sandhill Crane. There, the court heard evidence about the effects of the project and, in fact, the United States Fish and Wildlife Service designated the habitat on an emergency basis to try and stop the project.

[13] The district court, moreover, expressly declined to rule on any alleged § 9 violation. June 10, 2005 Injunction at 4-5 (ER563-564). Nor did the district court premise its decision on a violation of § 7(d) of the ESA, which prohibits an agency from undertaking actions during a § 7(a)(2) consultation that will result in an irreversible and irretrievable commitment of resources. 16 U.S.C. § 1536(d). *See Natural Resources Defense Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998);

Service violated an important procedural requirement of the ESA necessary to trigger the § 7(a)(2) formal consultation process. The same is true for this Court's decision in *Badgely*. It also is quite different than *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987), where like in *TVA v. Hill*, the Corps was going to destroy or adversely modify essential habitat and jeopardize the species because the Corps' other mitigation option fell through.[14]

Yet, in the June 10, 2005 Injunction, the district court not only issued an injunction without identifying what congressionally mandated procedural or substantive violation of the ESA it was trying to avert (as in the cases above), it went a step further and directed how the agency should act. The district court took this unprecedented step of imposing one approach to river operation, against the advice of the expert agencies, without providing detailed findings of fact or discussing the evidence in the record.[15] The preliminary injunction does not even

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Pacific Rivers Foundation v. Thomas, 30 F.3d 1050, 1056 (9th Cir. 1995). Had the court decided not to wait until after this summer to issue its relief on the 2004 BiOp, and even invalidated the 2004 BiOp and then invoked § 7(d), it would have been required to examine whether an irretrievable and irreversible commitment of resources would occur this summer before enjoining the activity, an inquiry that it did not do. *See also, Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992).

[14] The *Marsh* court also found that the Corps committed a procedural violation under the ESA by failing to re-initiate consultation. *Marsh*, 816 F.2d at 1388.

[15] Indeed, the only arguable detailed finding in the order appears to rest on an erroneous factual assumption. The June 10, 2005 Injunction erroneously suggests

address the specific irreparable harm, other than to state that the existence and operation of the dams causes mortality. June 10, 2005 Injunction at 9 (ER568). Such a conclusory judgment, that there is mortality to the species, without more detail and without a review and discussion of the evidence regarding the causes of that mortality (and, again, the district court did not render any judgment on NWF's claim for a § 9 violation, and the only violation arguably present is one under the APA against the Corps), cannot support an injunction. *See Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1230 (9th Cir. 2001) (an injunction must be supported by findings of fact).

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a significant difference between 2000 Biological Opinion ("2000 BiOp") spill regime and 2004 UPA spill regime. June 10, 2005 Injunction at 9 (ER568). The district court incorrectly assumes that: (1) the 2004 UPA's spill regime for Lower Granite, Little Goose, Lower Monumental and McNary Dams is different from the spill regime required by the 2000 BiOp Reasonable and Prudent Alternative ("RPA"); and (2) the 2004 UPA's spill regime is a retreat from the 2000 BiOp's spill regime. The 2004 UPA and 2000 BiOp spill regimes, however, are identical. Under the UPA, there is no summer spill at Lower Granite, Little Goose, and Lower Monumental Dams on the lower Snake River and McNary Dams on the Columbia River. See UPA at 50 (Table 4) (Exhibit BPACG0075). Likewise, the 2000 BiOp's RPA Action 54 describes the annual spill program that the Corps was required to execute each year. See 2000 BiOp at 9-88 through 9-92 (Exhibit BPACG0078-BPACG0082). Specifically, with regard to summer operations at collector dams, footnote no. 1 of table 9.6-3 states, "Summer spill is curtailed on or about June 20 at the four transport projects (Lower Granite, Little Goose, Lower Monumental and McNary dams) due to concerns about low inriver survival rates." 2000 BiOp at 9-89 (Exhibit BPACG0079). A district court's grant of an injunction "will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 455 (9th Cir. 1994), and here there certainly was clear erroneous finding of fact.

To be sufficient, the district court's preliminary injunction factual findings "must be explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision." *Enforma Natural Products, Inc.*, 362 F.3d at 1216; *see also* Fed. R. Civ. P. 52(a); Fed. R. Civ. P. 65(d). The June 10, 2005 Injunction omits any real findings of fact, in contrast to other ESA cases, where the courts issued injunctive relief after carefully analyzing the evidence presented and making detailed factual findings. *Eg. Greenpeace v. National Marine Fisheries Service*, 106 F.Supp. 2d 1066, 1076-1079 (W.D. Wash. 2000) (the court's discussion cites the Administrative Record and expert opinions to support its decision to impose the injunction); *National Wildlife Federation v. National Marine Fisheries Service*, 235 F.Supp. 2d 1143 (W.D. Wash. 2002) (detailed discussion by the court includes reference to numerous declarations to support the court's finding that the preliminary injunction standard was met); *Natural Res. Def. Council Inc., v. Evans,* 364 F.Supp. 2d 1083 (N.D. Cal 2003) (the court included references to the Administrative Record and declarations); *Greenpeace Found v. Mineta*, 122 F.Supp. 2d 1123, 1137-40 (D. Hawaii 2000) (the court included discussion of the public interest). Indeed, in *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001)—one of the cases relied upon by the district court in issuing its May 26, 2005 Opinion—the court there provided

detailed findings, with references to the various declarations and competing evidence.

In the June 10, 2005 Injunction, the district court, moreover, made no attempt to explain whether its extraordinary mandatory injunction is sufficiently tailored to address any alleged irreparable harm. Mandatory injunctive relief falls outside the scope of a traditional prohibitory injunction by altering, not maintaining, the status quo. *See Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) ("A prohibitory injunction preserves the status quo. . . . A mandatory injunction 'goes well beyond simply maintaining the status quo *pendente lite* [and] is particularly disfavored.'") (citation omitted). This type of extraordinary mandatory relief materially departs from controlling injunction standards and distinguishes this controversy from other cases under the ESA, where only prohibitory injunctions were issued following disposition of the merits. *See Greenpeace v. National Marine Fisheries Service*, 106 F. Supp. 2d 1066 (W.D. Wash. 2000) (enjoining groundfish trawl fishing); *Natural Res. Def. Council, Inc. v. Evans*, 279 F. Supp. 2d 1129 (N.D. Cal. 2003) (prohibiting use of sonar in coastal areas absent compliance with certain conditions); *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1137-30 (D. Hawaii 2000) (enjoining operation of lobster fishery); *National Wildlife Federation v. National Marine Fisheries Service*, 235 F. Supp. 2d 1143 (W.D. Wash. 2002) (enjoining dredging).

By directing how the agency must act this summer, the district court effectively usurps the function of the executive agencies, and it does so without an appreciation of attendant circumstances or any particular expertise. Courts undoubtedly have broad discretion when fashioning relief under the APA. Yet, it should be the rare case—and only after, at minimum, a detailed review—when a court should direct specific relief, such as has been done here. This is because any such relief, rendered in the isolated chambers of a district court that must simply respond to the parties and issues before it, cannot account for the many issues that confront executive agencies when they act. *Cf. Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 2381 (2004) (holding that the guiding principles behind the APA are "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve").

This Court recognizes such limitations, and has held that "[w]hen the effect of a mandatory injunction is equivalent to the issuance of mandamus, it is governed by similar considerations." *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986) (citing to *Miguel v. McCarl*, 291 U.S. 442 (1934)). Looking to the standards developed under the mandamus statute, 28 U.S.C. § 1361, this Court stated:

> Mandamus relief is only available to compel an officer of the United States to perform a duty if (1) the plaintiff's claim is clear and certain;

> (2) the duty of the officer is 'ministerial and so plainly prescribed as to be free from doubt,'[;] . . . and (3) no other adequate remedy is available."

Id. (citations omitted). *Fallini* was followed by *Oregon Natural Resource Council v. Harrell*, 52 F.3d 1499 (9th Cir. 1995), where this Court observed that "[w]hile recognizing that ONRC made a compelling case for doing something about the partially-completed dam to save the fisheries, the district court believed it was appropriate to give the agencies with expertise an opportunity to respond to the new information on remand before ordering the mandatory relief ONRC sought." *Harrell*, 52 F.3d at 1508. *Harrell* thus counsels deferral to the appropriate agency process for responding to how best to remedy perceived errors in an agency's action, particularly where circumstances are constantly changing and there is a need for adaptive management. *Cf. Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 832 (9th Cir. 2002) ("[t]he court did not, however, direct the exercise of that judgment or discretion. Rather, the court . . . deferred to the expertise of the agency in determining what interim measures would be required until the NEPA violation could be cured.").

In this case, therefore, mandatory relief would not be appropriate under the standards for issuing mandamus, because there clearly is no outstanding ministerial obligation on the part of the agencies to undertake the spill program and the order to do so intrudes into the appropriate function of an executive agency. The

summer spill program is not contained in the law or even in any outstanding biological opinion. No dispute exists that the Corps, absent an injunction, will not spill at the four "collector" dams—Lower Granite, Little Goose, Lower Monumental and McNary—during the June 21-August 31 period. *See* UPA at 50 (Table 4) (Exhibit BPACG 0075). Summer spill regimes embody an assessment of the relative efficacy of juvenile in-stream migration and transportation given historical flow conditions. The UPA reflects the considered exercise of discretion by the three agencies with respect to how they would discharge general statutory responsibilities.

Finally, the district court also failed to address the concerns of the Federal Defendants, BPA Customer Group and the States of Washington and Idaho regarding the harm the mandatory injunction may present to SRF Chinook. Significant concerns are raised regarding adverse impacts on adult fish passage, the risk of increased fish mortality associated with higher water temperatures, the risk of elevated TDG from the increased spill, or the impact to other species (including other listed species) due to reservoir drawdown and decreased water particle travel time. *See infra*, p. 9 n.5 (citing declarations detailing the increased risk to salmonids due to increased spill).

B. Part II – The U.S. District Court Erred by Concluding that the 2004 Biological Opinion was Legally Flawed.

Assuming, arguendo, that this Court concludes that the district court did not

abuse its discretion in issuing an injunction, it might then decide whether the entire premise for the court's June 10, 2005 Injunction, that the 2004 BiOp is legally flawed, is erroneous as a matter of law. The BPACG understands that this issue is not appropriate for resolution by this Court until the district court issues an appealable order on the merits, although if this Court believes that such an inquiry is necessary at this time to determine whether the action agencies appropriately relied upon the 2004 BiOp, we believe the district court erred in its May 26, 2005 Opinion.

The district court found that the 2004 BiOp was "legally flawed in four respects: (1) the improper segregation of the elements of the proposed action NOAA deems to be non-discretionary; (2) the comparison, rather than aggregation, of the effects of the proposed action; (3) the flawed critical habitat determinations; and (4) the failure to consult adequately on both recovery and survival in the jeopardy determination." May 26, 2005 Opinion at 15 (ER338). On each of these legal issues, the district court erred in its interpretation and understanding of the application of the ESA.

1. The district court erred in holding that § 7(a)(2) requires aggregation of the baseline and effects of non-discretionary and other activities not part of any proposed action.

The district court erroneously holds that § 7(a)(2) of the ESA requires the action agencies who operate the FCRPS to mitigate, or otherwise be responsible

for, the combined adverse impacts related to: (1) past actions (such as the existence of the dams and modifications to the Columbia River estuary); (2) actions which the FCRPS operators lacked statutory authority to change; and (3) actions of third parties (such as harvest and hatcheries' actions).[16] NOAA's application of § 7(a)(2), however, is a logical—and, indeed, even necessary—outgrowth of the convergence of the case law occasioned by the treatment of "ongoing" agency actions as actions that trigger § 7(a)(2), and by the recognition that Congress did not intend that § 7(a)(2) would apply to non-discretionary actions.

Early on, NOAA and the U.S. Fish and Wildlife Service (collectively the "Services") recognized that Congress did not intend that § 7 would apply to non-discretionary agency actions. 50 C.F.R. § 402.03; 51 Fed. Reg. 19,937 (1986) ("a Federal agency's responsibility under section 7(a)(2) permeates the full range of discretionary authority . . . ." (emphasis added)). This is because non-discretionary actions do not afford the agency an opportunity to structure the action to avoid

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[16] The district court even cites to opinions that support NOAA's position that the ESA does not apply to non-discretionary actions. *See* May 26, 2005 Opinion at 17-18 (citing *Sierra Club v. Babbit*, 65 F.3d 1502, 1508 (9th Cir. 1995); *Ground Zero Ctr for Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082 (9th Cir. 2004); *Turtle Island Restoration Network v. NMFS*, 340 F.3d 969, 975 (9th Cir. 2003)). In referencing *Ground Zero*, although the court stated, without explanation, that the case does not support NOAA's position, it then proceeded to describe the case in a manner that makes clear that it does support NOAA's position.

jeopardy or adverse modification. *TVA v. Hill*, 437 U.S. at 183 (referring to examples from legislative history).[17] Appellate courts uniformly have rejected efforts to expand § 7(a)(2) to non-discretionary actions. In *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992), the court rejected as "far fetched" an effort to apply § 7 in an instance where the agency—in that case, the Federal Energy Regulatory Commission—had no authority to impose conditions on a hydroelectric licensee. The court observed that § 7 simply "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act," adding that *TVA* is "hardly authority to the contrary." *Id.* at 34 (emphasis in original). This same understanding has led other courts to conclude that § 7 does not apply where the agency lacks the discretion or authority to control the action. In *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509-10 n.12 (9th Cir. 1995), this Court observed that "[o]bviously, without authority to modify [a project], identification of reasonable and prudent alternatives serves no purpose." *See also Envtl. Prot. Info. Center v. Simpson Timber Co.*, 255 F.3d 1073, 1083 (9th Cir. 2001) (holding

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[17] A similar rationale exists for compliance with the National Environmental Policy Act ("NEPA"). *See Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001) ("the agency does not have sufficient discretion to affect the outcome of its actions, and its role is merely ministerial, the information that NEPA provides can have no affect on the agency's actions and therefore NEPA is inapplicable."); *National Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343-44 (9th Cir. 1995).

that because the Fish & Wildlife Service ("FWS") did not retain discretion over an Incidental Take Permit, it was not required to reinitiate consultation); *Natural Res. Def. Counsel v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) ("where there is no agency discretion to act, the ESA does not apply"); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073-75 (9th Cir. 1996) (holding that the FWS providing advice did not constitute a reservation of discretion, and hence there was no need to undertake § 7 procedures); *see also American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 298 (5th Cir. 1998).

The structure of the ESA underscores this case law. Congress expressly stated that one of the purposes of the ESA is that agencies "shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. § 1531(c)(1). In § 7(a)(1), Congress repeated this prescription. 16 U.S.C. § 1536(a)(1). Congress' intent to focus on the scope of an agency's authority—or discretionary actions—is also evident elsewhere in the ESA.[18]

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[18] When describing the consultation process, the Committee on Environment and Public Works commented that "[i]t is the intent of the committee that this review process would take place well before the exercise of agency discretion which would result in contracts for construction, actual construction activities, or other potentially destructive activity." H.R. Rep. No. 1625, 95th Cong. 2d Sess. (1978), *reprinted* in A LEGIS. HIST. OF THE ESA OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979 AND 1980 FOR THE COMM. ON ENV'T & PUBLIC WORKS OF THE U.S. SENATE, 97th Cong. 2d Sess. 744 (1982). When issuing a biological opinion in which jeopardy exists, the Secretary is limited to suggesting reasonable and prudent alternatives that "can be taken by the Federal agency or applicant. . ." 16

The question is how to apply this principle in the context of ongoing agency actions, an area of law that expanded following the decision in *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994). There, the court concluded that the federal agencies' *ongoing* and continued implementation of land management planning documents constitutes agency action. This case had a profound affect on the scope of actions that would now be subsumed by the § 7 obligation[19] and ultimately presented the problem of how to address ongoing actions where the agency retains some—but not all—discretion or authority to control.

The 2004 BiOp reflects the pragmatic and logical solution to the convergence of these two principles. The Services necessarily had to examine the *effects* of *the proposed action*—the continued operations—without suggesting that the effects would include the consequences of actions over which the agency no longer has any discretion or authority to control, including past actions such as the construction and now existence of the dams. The only principled way to accomplish this was to incorporate these effects into the environmental baseline, as required by the ESA and 50 C.F.R. § 402.02 (effects of the action). NOAA

U.S.C. § 1536(b)(3); 50 C.F.R. § 402.02. *Cf. Southwest Center for Biological Diversity*, 143 F.3d at 523.

[19] *See generally* Arthur D. Smith, *Programmatic Consultation Under the Endangered Species Act: An Anatomy of the Salmon Litigation*, 11 J. ENVTL. L. & LITIG. 247 (1996).

appropriately did this by describing the consultation as focusing on the discretionary part of the continued operations. This is entirely consistent with those cases that require that the scope of biological opinions—and thus the scope of the proposed action being consulted on—is governed by the underlying statutory program for the action agency. *See Connor v. Burford*, 848 F.2d 1441 (9th Cir. 1988) (examining the scope of agency action under the Mineral Leasing Act), *cert. denied*, 489 U.S. 1012 (1989); *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980) (examining the scope of agency action under the Outer Continental Shelf Lands Act); *see also Village of False Pass v. Watt*, 565 F. Supp. 1123 (D. Alaska 1983), *aff'd sub nom. Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984).

Moreover, if non-discretionary aspects of an ongoing action are included in a § 7 "consultation" as part of a proposed action, then § 7(d), 16 U.S.C. § 1536(d), for instance, could suggest that such actions might have to halt pending completion of the consultation, a result completely at odds with Congress' purpose not to override an agency's existing authorities and limitations. Finally, a § 7(a)(2) consultation ensures that the appropriate service agency with wildlife expertise, here NOAA, has a meaningful opportunity to influence decisions by the action agency. Where the action agencies have no authority to make decisions, and thus no discretion, the fundamental purposes of the consultation processes cannot be

achieved and consultation would be futile.

A similar principle underlies this Court's judgment in *National Wildlife Federation v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1179 (9th Cir. 2004). There, this Court interpreted the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, and the Rivers and Harbors Act of 1945, Pub. L. No. 79-14, § 2, 59 Stat. 10 (1945) *in pari materia* by limiting the CWA's application to discretionary activities. *National Wildlife Fed'n*, 384 F.3d at 1178.[20] The plaintiffs had sued the Corps for violations of water quality standards adopted by the State of Washington allegedly arising from the Corps' operation of four dams on the Lower Snake River. *Id.* at 1168-69. This Court rejected the plaintiffs' challenges to the Corps' conclusions. The plaintiffs argued that "even if it could be shown that the existence of the dams is the sole cause of temperature exceedances, the Corps would still be in violation of the CWA because there is no legal distinction between exceedances caused by existence of the dams as opposed to the operation of the dams." *Id.* at 1178. This Court disagreed and explained:

> The CWA's directive to federal agencies requiring compliance with state water standards must be construed *in pari materia* with the River Harbor Act's directive that the dams be built in the first instance. . . . [A] more sensible interpretation of the CWA is that ***discretionary*** operations of the dams, consistent with the statutory

[20] Notably, the court reached this conclusion even absent a clearly applicable rule like 50 C.F.R. § 402.03.

> regime established by Congress, should comply with state water law standards.

Id. at 1178-79 (emphasis added).[21] The court declined to second guess the non-discretionary directives Congress had set forth decades earlier:

> Our review of the Corps's [sic] conclusions . . . does not extend to Congress's [sic] decision to create these dams almost sixty years ago, which of course was not within the discretion of the Corps. We cannot determine that the Corps was arbitrary and capricious, or acted contrary to law, in not taking action that would *nullify the purpose of the federal dams, including forgoing water impoundment and power generation*, in practical effect similar to removing the dams, where the Corps had no power to take such an action.

Id. at 1179 (emphasis added). Like the CWA, the ESA does not provide express statutory authority to ignore these other statutory obligations. As such, § 7(a)(2) obligations must be read in conjunction with the other statutory obligations.[22] *See,*

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[21] While the district court suggested that *National Wildlife Federation* is inapposite, because the sole cause of the salmon and steelhead decline there was the existence of the dams and not any discretionary method of operating them, (May 26, 2005 Opinion at 23), the language of the Ninth Circuit's opinion suggests otherwise. The Ninth Circuit stated that "[w]e cannot agree with [the plaintiffs'] argument that the occurrence of a temperature exceedence, even if necessarily caused by the existence of the dams *and the Corps's operation of the dams consistent with the purposes stated by Congress*, renders the Corps in violation of the CWA." *National Wildlife Fed'n*, 384 F.3d at 1178-79 (emphasis added).

[22] The district court suggests that, in instances when an agency lacks discretion to avoid impacts, the only option is to seek an exception from the Endangered Species Committee ("ESC") or "God Squad." (May 26, 2005 Opinion at 22) (citing 16 U.S.C. § 1536(e)-(l)). This misunderstands the role of the ESC; it can exempt an agency action from the ESA, but it has no authority to exempt an agency from other laws. As a consequence, the ESC in the scenario suggested by the district court would be bound to always grant the ESA exemption. This clearly

e.g., In re Operation of Missouri River System, 2004 WL 1402563, 3 (D. Minn. 2004), *appeal docketed*, No. 04-2737 (8th Cir. July 16, 2004) ("The Corps must consider both competing river interests and its legal obligations in the operation of the Missouri River.").

By ignoring that the proposed action triggering the consultation neither did nor could have included the non-discretionary aspects of the system associated with the construction and existence of the dams, the district court then eviscerates any meaningful purpose behind the requirement to identify the "baseline" and assess the "effects of the action" upon that baseline. It does this by holding that NOAA could not rely upon its "Net Effects Analysis."

Generally, the Net Effects Analysis involves: (1) defining the reference operation and UPA; (2) modeling flows under a reference and UPA operation; (3) estimating salmonid survival under the different flows and operating regimes associated with the reference and proposed operation; and (4) estimating the relative differences in survival for each of the listed salmonid species under the reference and proposed operations. NOAA termed this latter step the "GAP analysis." 2004 BiOp, Appendix D-26 to D-93 (ER1019-ER1086).

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was not Congress' intent. For a discussion of the ESC by one who participated in the process, see Patrick A. Parenteau, *The Exemption Process and the "God Squad," reprinted in* ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVES 131 (Baur & Irvin eds. 2002).

The output of the GAP analysis is the relative differences in salmonid survival between the reference operation and UPA estimated for each year of the 1994-2003 study period as projected for the years 2004, 2010 and 2014. *Id.* These relative differences among years reflect a consideration of changes in survival that would accrue with actions and programs implemented over the next 10 years. *Id.* The results of this analysis (summarized in Table 6.11 of the 2004 BiOp, p. 6-60 (ER806)) show a generally progressive narrowing of the gap between estimated survival under the reference condition and the UPA and in a few cases (*e.g.*, Snake River Spring/Summer Chinook, Upper Columbia River Spring Chinook) higher survival under the UPA by 2004. 2004 BiOp, p. 6-68 through 6-70 (ER814-ER816).

The "net effect" of the action is the difference in survival between the proposed action and the environmental baseline, extended forward over the ten-year 2004 BiOp timeframe. *See* 2004 BiOp, Appendix D-1 (ER994). The reference operations reflect a "best case" scenario, a surrogate for the lowest net effects considered reasonably possible to achieve by modifying hydropower operations to become as "fish-friendly" as practicable. *Id.*

In defining the reference operation, NOAA set operations to optimize fish survival within the physical limitations of the hydro system. To provide fish with the maximum in survival, NOAA requires the reference operation to meet

numerous "fish protection constraints," including refilling federal storage projects by June 30; meeting spring and summer flow objectives; meeting flow objectives for other listed species; and reducing forced (involuntary) spill at mainstem dams to limit dissolved gas. 2004 BiOp at 5-9 (ER652); Appendix D at D-22 to D-24 (ER1015-ER1017). Since four of the Federal dams are configured to collect and transport juvenile salmonids, transportation (to the extent NOAA scientists judged it to be beneficial) is also considered part of the baseline.

This type of analysis, therefore, is an appropriate method for understanding the "effects of the action" for an ongoing proposed project (*e.g.*, operation of the FCRPS) that includes ongoing effects from non-discretionary, past actions that necessarily must be separated and put into the environmental baseline. The "effects of the action" that must be analyzed is defined in the regulations as:

> Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area.

50 C.F.R. § 402.02. In finalizing this rule, the Services explained:

> In determining the "effects of the action," the Director first will evaluate the status of the species or critical habitat at issue. This will involve consideration of the present environment in which the species or critical habitat exists, as well as the environment that will exist when the action is completed, in terms of the totality of factors affecting the species or critical habitat. The evaluation will serve as

> the baseline for determining the effects of the action on the species or critical habitat.

51 Fed. Reg. at 19932. And this type of analysis is necessarily a comparative one, which develops the environmental *status quo* or baseline against which the effects of the proposed action can be measured.[23] The Department of the Interior Solicitor's Office explained this analysis in a formal M-Opinion issued in 1981:

> Once the "project has been defined, the consultation team should then focus on analyzing the environmental baseline in the affected area. This is necessary for determining what the environmental "status quo" is going to be at the time of the consultation on the proposed project. The impacts of the project under review should then be measured against the environmental baseline.
>
> In determining the environmental baseline, the consultation team should consider the *past* and *present* impacts of *all* projects and human activities in the area, regardless of whether they are federal, state or private in nature. This is logical since the actual impacts of these projects and activities are not dependent upon the origin of their sponsorship; rather, they all are contributing influences which mold the present environmental status quo of any given area.

Solicitor's Opinion, M-36938, 88 Interior Decisions 903, 907 (1981). And in *National Wildlife Federation v. Coleman*, 529 F.2d 359, 374 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976), the court there expressed the goal of a § 7

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[23] This is consistent with the Services' responsibilities in preparing a biological opinion, in accordance with 50 C.F.R. § 402.14(g), which requires evaluating the current status of the species or critical habitat, then evaluating the effects of the action and cumulative effects on the listed species or habitat, and then formulating a biological opinion "as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of the listed species."

consultation as one of protecting against any "further threaten[ing]" of the likelihood of the survival of a listed species. *See also Northwest Envtl Advocates v. National Marine Fisheries Service*, 2005 WL 1427696 (W.D. Wash. June 15, 2005) (upholding jeopardy analysis where proposed action improved upon a biologically degraded baseline). As a consequence, NOAA appropriately employed a comparative approach to understanding the effects of the action and the district court erred in requiring an "aggregation" of effects that is nowhere to be found in the regulations or in the ESA.

2. The district court erred in holding that NOAA inadequately analyzed impacts to critical habitat necessary for recovery.

The district court also erred in holding that NOAA's analysis of impacts to critical habitat necessary for recovery was arbitrary and capricious. May 26, 2005 Opinion at 29-34 (ER352-ER357). The 2004 BiOp clearly shows that NOAA analyzed impacts on critical habitat and its implication for survival and recovery separately, consistent with *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004), and found on the basis of the administrative record that the UPA would neither impair survival nor preclude recovery.

The court in *Gifford Pinchot* addressed whether a resource agency (in that case the FWS) must consider in a biological opinion the impacts of the complete destruction (or removal) of designated critical habitat on a species' likelihood of

recovery. This Court held that the ESA requires resource agencies to analyze the impacts of critical habitat destruction on both survival and recovery of listed species when determining whether a proposed action "adversely modifies critical habitat."[24] *Id.* at 1069.

Unlike the FWS in *Gifford Pinchot*, NOAA, in its critical habitat analysis, carefully analyzed the impacts of the UPA on the likelihood of recovery as well as survival. *See* 2004 BiOp at 8-13, 8-7, and 8-35 (ER915, ER909, ER937). NOAA's critical habitat analysis involved a straight-forward, two-step analysis. 2004 BiOp at 8-3 (ER905). First, NOAA analyzed whether the UPA would alter an essential feature of the designated critical habitat. Second, NOAA also analyzed whether that impact would appreciably diminish the value of critical habitat for either survival or recovery. *Id.*

For each of the three designated critical habitats, NOAA determined that the

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[24] The facts in *Gifford Pinchot* involved a challenge to several biological opinions addressing the impacts of N.W. Forest Plan timber harvests on the Northern spotted owl and the owl's designated critical habitat. *Gifford Pinchot*, 378 F.3d at 1064. In those biological opinions, FWS concluded that the complete loss of designated critical habitat (through logging) did not result in the "destruction or adverse modification" of designated "critical habitat," because such actions did not appreciably reduce the likelihood of survival. *Id.* at 1069. Instead, the FWS argued that the N.W. Forest Plan's late successional reserves ("LSRs") (where logging was for the most part prohibited) compensated for the lost designated critical habitat. *Id.* The FWS opined that the creation of the N.W. Forest Plan with its LSRs made the previously designated critical habitat obsolete. The court rejected that argument, concluding that suitable alternative habitat, here LSRs, is no substitute for designated critical habitat. *Id.* at 1076.

UPA, at least in the short-term, would have a marginal negative impact in comparison to the reference operation. Because of those findings, NOAA analyzed whether the UPA would appreciably diminish the value of critical habitat for either survival or recovery. *See* 2004 BiOp at 8-13 (ER915). The 2004 BiOp included similar conclusions for Snake River Sockeye and Snake River Spring/ Summer Chinook. *See* 2004 BiOp at 8-7 and 8-35 (ER909, ER937). These findings reveal that NOAA carefully considered the impact of the action on both survival and recovery.

The district court cited *Pacific Coast Federation of Fishermen's Associations, Inc. v. NMFS*, 265 F.3d 1028 (9th Cir. 2001) ("*PCFFA*"), in making the point that the Federal agency must consider short-term, in addition to long-term, impacts to the species. May 26, 2005 Opinion at 32. While this is certainly true, unlike *PCFFA*, where the court found that NOAA failed to analyze the short-term implications of an action on the species, NOAA did not ignore the short-term implications of the UPA on designated critical habitat, but instead thoroughly analyzed these short-term implications and reached a well-reasoned conclusion regarding the biological significance of such impacts.

3. The district court erred in holding that NOAA improperly omitted analysis of recovery in the jeopardy determination.

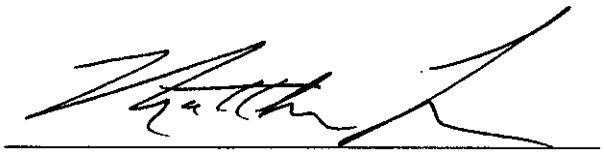
The district court's holding that NOAA should have applied the holding in *Gifford Pinchot* to the jeopardy analysis reflects a complete failure to appreciate

the debate surrounding critical habitat designations that has occurred during the past decade or so. Critical habitat is defined in the ESA and includes in its analysis, as this Court held in *Gifford Pinchot*, the requirement for conservation which embraces the recovery standard. 16 U.S.C. § 1532(3). Nothing in the ESA or the regulations applies this same standard to the concept of "jeopardy." See *Forest Guardians v. Veneman*, 2005 WL 820528 (D. Ariz. March 31, 2005) ("the logic in *Gifford Pinchot Task Force* does not compel the conclusion that the definition of jeopardy is invalid"). Indeed, a noted environmental law professor, Oliver Houck, criticized the Service agencies for not recognizing the independent role of designating critical habitat, arguing that such designations *added* to the jeopardy standard by also requiring an inquiry into whether the action would prevent recovery. Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce,* 64 U. Colo. L. Rev. 277, 288-310 (1993). As he explained, Congress in 1978 "reaffirmed the separate and independent role that critical habitat would continue to play. The only legal significance for critical habitat in the statute is its eligibility for protection separate from the protections afforded to species from jeopardy in general." *Id.* at 300. In the May 26, 2005 Opinion, the district court simply turned this entire analysis upside down by holding that the standard for jeopardy and critical habitat are the same, even though it was precisely because they were not the same that

commentators, and this Court in *Gifford Pinchot*, concluded critical habitat means something more because it adds the requirement to promote recovery.

VIII. Conclusion

For the reasons stated above, the BPA Customer Group respectfully requests that this Court set aside the U.S. District Court for the District of Oregon's June 10, 2005 Injunction.



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STATEMENT OF RELATED CASES
PURSUANT TO NINTH CIRCUIT RULE 28-2.6

Petitioners BPA Customer Group hereby state that they are unaware of any pending related cases before this Court as defined in Ninth Circuit Rule 28-2.6.

Date June 30, 2005

Respectfully submitted,

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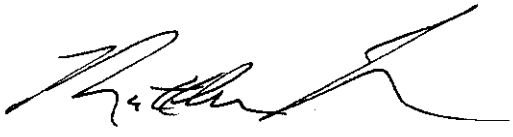
FORM 8
CERTIFICATE OF COMPLIANCE
TO FED. R. APP.32(a)(7)(C) AND CIRCUIT
RULE 32-1 FOR CASES NOS.
Nos. 05-35569 & 05-35570

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached BPA CUSTOMER GROUPS' BRIEF IN SUPPORT OF THE PRELIMINARY INJUNCTION APPEAL is proportionally spaced, has a typeface of 14 points or more and contains 12,527 words.

DATED at Seattle, Washington, on June 30, 2005.



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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 719 Second Avenue, Suite 1150, Seattle, Washington 98104-1728.

On June 30, 2005, I served by first-class U.S. mail on the parties listed below:

1. a true and correct copy of the BPA Customer Group's Brief in Support of the Preliminary Injunction Appeal; and

2. a true and correct electronic copy (CD) of the Bates-Stamped Exhibits to the Brief in Support of the Preliminary Injunction Appeal.

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I, Matthew Love, declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of June, 2005, at Seattle, Washington.

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